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In the Supreme Court of the United States

OCTOBER TERM, 1986

CLARA WATSON, PETITIONER

v.

FORT WORTH BANK & TRUST

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a plaintiff can state a cause of action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. III) 2000e *et seq.*, based on an alleged disparate impact resulting from a subjective promotion practice or procedure.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States with respect to the first question presented by the petition.

STATEMENT

1. Petitioner, Clara Watson, is a black woman. She was hired in August 1973 by respondent, Fort Worth Bank & Trust, as a proof operator; in January 1976, she was promoted to the position of teller in respondent's motor bank; and, in February 1980, she was promoted to the position of commercial teller in the bank's main lobby (Pet. App. 4a). Over the course of the next year, however, petitioner applied unsuccessfully on four occasions for promotion to supervisory positions in the bank (*id.* at 4a-5a).[1] Accordingly, in August 1981, she re-

[1] First, petitioner applied for promotion to the position of supervisor of all tellers (Pet. App. 4a). Three other employees—one white male and two white females—also applied for the promotion (*ibid.*). Gary Shipp, a senior vice president of the bank and the

signed from her employment with respondent (*id.* at 5a).

2. In October 1981, after exhausting her administrative remedies, petitioner filed this Title VII action, 42 U.S.C. (& Supp. III) 2000e *et seq.*, alleging that respondent had discriminated against her and other blacks in hiring, evaluation, promotion, and various other employment decisions (Pet. App. 4a, 5c, 1d). On motion, the district court certified petitioner to represent a class consisting of all "blacks who applied to or were employed by [respondent] on or after October 21, 1979 or who may submit employment applications to [respondent] in the future" (*id.* at 2c). It then held a three-day trial concerning petitioner's discrimination claims on behalf of this class (*id.* at 1c-2c).

At trial, petitioner produced evidence showing that respondent had not had a black director or officer since 1975, that during this period respondent had employed only one black in any type of supervisory capacity at all, and that, during the period 1981-1983, blacks constituted approximately 13% of respondent's workforce (Pet.

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person to whom the supervisor of tellers reported, selected the white male, Richard Burt, for the promotion (*ibid.*). At the time, Burt was petitioner's supervisor (*ibid.*).

Second, petitioner applied for promotion to the position of supervisor of tellers in the motor bank (Pet. App. 5a). Six or seven other employees also applied for the promotion (*ibid.*). Burt, as supervisor of all tellers, selected Pat Cullar, a white female, for the promotion (*ibid.*; see also *id.* at 3c-4c).

Third, after Burt was further promoted to assistant vice-president, petitioner again applied for the position of supervisor of tellers (Pet. App. 5a). Three other employees—two white females and one black female—also applied for the promotion (*ibid.*). Burt, the new supervisor of the position, chose Cullar for this job as well (*ibid.*).

Fourth, with Cullar vacating the position of motor bank teller supervisor, petitioner again applied for that job (Pet. App. 5a). At least two other employees—a white male and a black female—also applied for the promotion (*ibid.*). Based on Cullar's recommendation, Burt selected Kevin Brown, the white male, for the job (*ibid.*).

App. 5c).[2] In addition, petitioner's expert testified, on the basis of applicant flow and other statistical data, that a black who applied for a job with respondent had one-fourth the chance of a white applicant to get the job; that a black employee's performance was apt to be evaluated more severely by respondent than a white employee's performance (and therefore blacks were paid approximately $46.00 less per month for comparable work); and that respondent advances blacks to greater responsibilities at a rate six-tenths of a pay grade per year more slowly than equally qualified white employees (*id.* at 19a, 21a-25a). Finally, petitioner recounted the events surrounding the promotions for which she had unsuccessfully applied (Tr. I6-I248).

Respondent countered with evidence showing that job openings were generally posted, that outside candidates were considered only if no existing employee was among the qualified applicants, that the individual who supervised a particular position made the initial employment decisions concerning that position—hiring, salary adjustment, promotion, etc.—in accordance with his or her best judgment, albeit guided by certain standardized criteria and subject to general review (though rare reversal) by the bank's highest officials (Pet. App. 7a, 14a-15a, 23a, 7c, 13c; Tr. II36-II37, II79-II84, II217-II219, II245-II249, III32-III33, III280-III283).[3] In addition, respondent produced evidence concerning the relative qualifications of the applicants to the four promotions for which petitioner had unsuccessfully applied and the reasons why peti-

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[2] Specifically, petitioner showed that respondent employed 68 whites and 9 blacks in 1981, 72 whites and 9 blacks in 1982, and 71 whites and 7 blacks in 1983 (Pet. App. 6a).

[3] The standardized criteria, as to which supervisors were required (at least for salary evaluation purposes) to assign point values, included accuracy of work, alertness, personal appearance, supervisor-co-worker relations, quantity of work, physical fitness, attendance, dependability, stability, ambition, friendliness, courtesy, job knowledge, and experience (supervisory or otherwise). See Pet. App. 23a n.26; Tr. III32-III45, III75-III76.

tioner had not been chosen for those positions (Pet. App. 4a-5a, 7a, 10a). Finally, respondent criticized petitioner's expert statistical evidence, noting that blacks comprised 11.8% of the county population, 10.2% of the metropolitan area population, and 22.8% of the city population, and that petitioner's applicant flow analysis did not account for the relative qualifications of the persons in the applicant pool (*id.* at 22a-23a).

On the basis of this evidence, the district court determined that it had erred in certifying petitioner to represent the class and, on the merits, rendered judgment for respondent (Pet. App. 5a-6a, 8c-16c). With respect to the certification issue, the court found (*id.* at 5a) that existing black employees (such as petitioner) did not share a common question of law or fact with non-employee applicants and that the existing employees formed too small a group to satisfy the "numerosity" requirement of Fed. R. Civ. P. 23(a). Accordingly, the court subdivided the class into applicants and employees and held that petitioner could not advance claims on behalf of either class (Pet. App. 5a). Then, with respect to the merits, the court held that, while a prima facie case of race discrimination had been established, petitioner had failed to demonstrate that respondent's articulated reasons for failing to promote her were pretextual (*id.* at 5a, 8c-10c) and that petitioner had presented "little or no evidence of discrimination" in any of respondent's promotion decisions (*id.* at 14c-15c).[14] Finally, it ruled

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[4] Specifically, the court held that respondent had credibly explained that Richard Burt and Pat Cullar, who were selected for the positions of supervisor of tellers and motor bank teller supervisor, respectively, were more qualified (because of greater experience and superior evaluations) than petitioner (Pet. App. 9c-10c). It further held that respondent had credibly explained that, while petitioner had more experience than Kevin Brown (who was promoted over petitioner to the position of motor bank teller supervisor), petitioner had difficulty getting along with co-workers and tellers and thus was not as good a candidate for promotion as was Kevin Brown (*id.* at 10c). Finally, the court noted that "[t]he evidence showed that[,] in addition to [petitioner], only one black,

that, although she was not a proper class representative, petitioner had "proceeded zealously on behalf of the group of blacks who applied for employment" and that, considering the pertinent statistical evidence, she had nevertheless failed to prove "discrimination against blacks as a class * * * on the basis of defendant's hiring practices" (*id.* at 16c).

3. The court of appeals affirmed in part and reversed in part (Pet. App. 1a-26a). It rejected petitioner's argument that the district court had abused its discretion in decertifying the class and in holding that petitioner could not represent the class of black employees (*id.* at 6a-8a). It further rejected petitioner's argument that the district court's non-discrimination finding on the promotion issue was clearly erroneous (*id.* at 8a-10a). It agreed, however, that the hiring discrimination claims of the applicant class should have been dismissed without prejudice (since there was no proper class representative) and that a remand was necessary for this purpose (*id.* at 10a).

a. On the promotion issue, the court rejected petitioner's argument "that the district court erred in not applying disparate impact analysis to her claims of discrimination in promotion" (Pet. App. 8a). It said that "a Title VII challenge to an allegedly discretionary promotion system is properly analyzed under the disparate treatment model rather than the disparate impact model" (*ibid.*) and that, having decertified petitioner's class-based challenge to respondent's "entirely subjective decisionmaking process" (*id.* at 6a (citation omitted)), the district court had properly treated petitioner's "claim as an individual disparate treatment claim" (*id.* at 8a). The court emphasized that "the plethora of statistics which [petitioner] introduced at trial" was still relevant to her allegations, both in "establishing a prima facie case of discrimination" and in "attempting to prove that

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Sylvia Harden, had applied for promotions which were given to whites" and that "Harden * * * did not allege that she has been discriminated against on that basis" (*id.* at 14c).

the reasons proffered by the [respondent] for its action[s] [were] either unworthy of credence or mere pretexts for discrimination" (*id.* at 9a). But the court found "no indication in the record, nor [was] there any suggestion * * * by [petitioner], * * * that the district court neglected to consider the statistical evidence presented by [petitioner] in terms of evaluating the credibility of the [respondent's] proffered explanations for its promotion decisions" (*id.* at 9a n.13).

b. Judge Goldberg dissented (Pet. App. 11a-25a). He agreed with petitioner that the district court had abused its discretion in decertifying the plaintiff class (*id.* at 11a-18a) and in failing to find that a pattern-and-practice of class-wide disparate treatment existed (*id.* at 19a-25a). He thus found "it unnecessary to decide whether [petitioner] could have proceeded under a disparate impact model as well" (*id.* at 19a), though he agreed that respondent's evaluation and promotion process does not "have much objective content" (*id.* at 23a n.26).

DISCUSSION

As noted in our petition for a writ of certiorari in *Tisch* v. *Shidaker*, No. 86-468 (filed Sept. 22, 1986),[5] copies of which are being provided to petitioner and respondent, the question whether a Title VII plaintiff can state a cause of action based on an alleged disparate impact arising from a subjective selection practice or procedure is a recurring and important one.[6] The courts of

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[5] On April 6, 1987, the Court granted our petition, vacated the judgment of the Seventh Circuit in that case, and remanded for further consideration in light of *Johnson* v. *Transportation Agency*, No. 85-1129 (Mar. 25, 1987).

[6] Among the issues deserving this Court's attention is the precise distinction between objective and subjective selection procedures. However that distinction might be drawn, which is an issue we will address if the Court grants certiorari, it is sufficient here to note our agreement with Professor Larson that selection processes which include both objective and subjective components must be considered subjective as a whole. See 3 A. Larson & L. Larson, *Employment Discrimination* § 76.34, at 15-91 to 15-98 (1986). Where a mixed-component selection process is involved, of course, a plaintiff

appeals are badly divided over the correct resolution of this question and the conflict among them shows no sign of abating. Moreover, the application of disparate impact analysis to subjective decisionmaking processes is inconsistent with the Court's decisions and, by converting most if not all garden variety disparate treatment cases into disparate impact cases, undermines the delicate accommodation of policies that Congress made in Title VII. Accordingly, this Court's immediate review is warranted.

1. There is much confusion among the courts of appeals concerning whether a Title VII plaintiff can maintain a disparate impact cause of action without first identifying an objective employment practice or procedure that he or she alleges causes the adverse impact. See generally B. Schlei & P. Grossman, *Employment Discrimination Law* 1288 (2d ed. 1983). The Second and Fourth Circuits have held that disparate impact analysis does not apply in challenges to subjective decisionmaking processes. See, *e.g.*, *Rossini* v. *Ogilvy & Mather, Inc.*, 798 F.2d 590, 605 (2d Cir. 1986); *EEOC* v. *Federal Reserve Bank*, 698 F.2d 633, 638-639 (4th Cir. 1983), rev'd on other grounds *sub nom. Cooper* v. *Federal Reserve Bank*, 467 U.S. 867 (1984); *Stastny* v. *Southern Bell Telephone & Telegraph Co.*, 628 F.2d 267, 274 n.10 (4th Cir. 1980). The First Circuit has expressed grave con-

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can challenge an objective component of that process for its own disparate impact. See *Connecticut* v. *Teal*, 457 U.S. 440 (1982). Petitioner has not, however, attempted to do so in this case. Rather, petitioner seeks to challenge the selection process as a whole and agrees with respondent that that process is subjective. See Pet. 7-8; Br. in Opp. 6-10; see also Pet. App. 8a, 23a n.26.

We do not address in this brief the permissibility of a plaintiff pursuing a disparate impact claim directed at the bottom line results of a multi-step, but completely objective, decisionmaking process. Compare *Pouncy* v. *Prudential Insurance Co. of America*, 668 F.2d 795, 800-801 (5th Cir. 1982) (suggesting that disparate impact theory never applies to multi-component systems, even if completely objective), with *Griffin* v. *Carlin*, 755 F.2d 1516, 1525 (11th Cir. 1985) (suggesting that disparate impact theory applies to all multi-component systems). That issue is not raised by the facts of this case.

cerns about the theory's applicability to subjective decisionmaking processes. See, *e.g.*, *Latino Unidos* v. *Secretary of HUD*, 41 Fair Empl. Prac. Cas. (BNA) 839, 848 (1st Cir. 1986); *Robinson* v. *Polaroid Corp.*, 732 F.2d 1010, 1015 (1st Cir. 1984). By contrast, the Sixth, Ninth, Eleventh, and District of Columbia Circuits have held that a disparate impact claim is cognizable even where an objective, facially neutral, employment practice has not been identified. See, *e.g.*, *Rowe* v. *Cleveland Pneumatic Co., Numerical Control*, 690 F.2d 88, 93 (6th Cir. 1982); *Atonio* v. *Wards Cove Packing Co.*, 810 F.2d 1477, 1480-1486 (9th Cir. 1987) (en banc); *Griffin* v. *Carlin*, 755 F.2d 1516, 1524-1525 (11th Cir. 1985); *Segar* v. *Smith*, 738 F.2d 1249, 1270-1272, 1288 n.34 (D.C. Cir. 1984), cert. denied, 471 U.S. 1115 (1985). The Courts of Appeals for the Fifth,[7] Seventh,[8] Eighth,[9]

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[7] Compare *Trevino* v. *Holly Sugar Corp.*, 811 F.2d 896, 902 (5th Cir. 1987) (disparate impact analysis does not apply to subjective decisionmaking processes), and *Pouncy* v. *Prudential Insurance Co. of America*, 668 F.2d 795, 800-801 (5th Cir. 1982) (same), with *Page* v. *United States Industries, Inc.*, 726 F.2d 1038, 1045-1046 (5th Cir. 1984) (assessing lawfulness of a "subjective promotional system" under both disparate treatment and disparate impact analysis).

[8] Compare *Coates* v. *Johnson & Johnson Co.*, 756 F.2d 524, 530-531 n.4 (7th Cir. 1985) (no disparate impact claim where no "facially neutral" rules identified), with *Stewart* v. *General Motors Corp.*, 542 F.2d 445, 450-451 (7th Cir. 1976), cert. denied, 433 U.S. 919 (1977) ("highly subjective and loosely structured" promotion practices subject to disparate impact theory), and *Regner* v. *City of Chicago*, 789 F.2d 534, 539 (7th Cir. 1986) (same).

[9] Compare *Taylor* v. *Teletype Corp.*, 648 F.2d 1129, 1132-1133 n.6 (8th Cir.), cert. denied, 454 U.S. 969 (1981) (disparate impact theory not available to challenge subjective decisionmaking process); *Harris* v. *Ford Motor Co.*, 651 F.2d 609, 611 (8th Cir. 1981) (same); and *Talley* v. *USPS*, 720 F.2d 505, 507 (8th Cir. 1983), cert. denied, 466 U.S. 952 (1984) (same), with *Gilbert* v. *City of Little Rock*, 722 F.2d 1390, 1397-1398 (8th Cir. 1983), cert. denied, 466 U.S. 972 (1984) (allowing plaintiff to use disparate impact theory without identifying an objective, facially neutral employment practice).

and Tenth [10] Circuits have found the issue so perplexing that panels within those circuits have reached conflicting answers.[11] This Court's intervention is needed to resolve the conflicts and to settle the confusion that presently exists among the courts of appeals.

2. On the merits, we submit that the court below correctly ruled that respondent's subjective promotion procedures may not be challenged on a disparate impact theory. To have ruled otherwise would have placed that court in conflict with this Court's decisions and would have undermined the policies that Congress sought to accomodate when it enacted Title VII.

a. When Congress enacted Title VII in 1964, it made clear that employers could no longer intentionally select among applicants and employees on the basis of race, sex, or certain other enumerated criteria (42 U.S.C. 2000e-2(a)(1)). Less clear, however, was whether employers could, in good faith and without the intent to discriminate, continue to use standardized tests and other mechanical devices for selecting among competing applicants and employees when the effect of using such devices is adverse to persons in one or more of the enumerated groups. See S. Rep. 91-1137, 91st Cong., 2d Sess. 4 (1970); Note, *Legal Implications of the Use of Standardized Ability Tests in Employment and Education*, 68 Colum. L. Rev. 691, 706-712 (1968). For a number of reasons, employers often prefer to use objective rather than subjective selection procedures. Standardized selection devices are less expensive to administer; they generally produce more consistent and comparable results; and, by depriving personnel officers of discre-

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[10] Compare *Mortensen* v. *Callaway*, 672 F.2d 822, 824 (10th Cir. 1982) (plaintiff could not assert disparate impact claim since "she ha[d] not pointed to any employment practice that, neutral on its face, has caused women not to be promoted"), with *Bauer* v. *Bailar*, 647 F.2d 1037, 1043 (10th Cir. 1981) (applying disparate impact analysis to subjective hiring and promotion decisions).

[11] To our knowledge, the Third Circuit has not yet addressed the issue.

tionary authority, they help ensure that Title VII's proscription against intentional discrimination is obeyed by those with the greatest opportunity to engage in such discrimination. See Cooper & Sobel, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 Harv. L. Rev. 1598, 1637-1638 (1969). Because it is difficult and expensive to fine-tune such objective devices so that they measure only qualities necessary to specific jobs, however, employers sometimes used tests and other specific qualifications that did not correspond with or measure what was necessary for competent performance and thereby disproportionately excluded members of certain minority groups from various employment opportunities. See *id.* at 1638-1649; see generally Blumrosen, *Strangers in Paradise*: Griggs v. Duke Power Co. *and the Concept of Employment Discrimination*, 71 Mich. L. Rev. 59, 66-75 (1972).

It was against this background that the Court, in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), first approved disparate impact theory as a means of establishing unlawful employment discrimination. At issue in *Griggs* were written aptitude tests and a high school diploma requirement that the employer used as prerequisites to certain jobs. The Court found that the aptitude test and diploma requirement, while "neutral on their face, and even neutral in terms of intent," disproportionately excluded blacks from employment and yet had no "demonstrable relationship to successful performance of the jobs for which [they were] used" (*id.* at 430, 431). The Court determined that Congress had intended to achieve "the removal of [such] artificial, arbitrary, and unnecessary barriers to employment" when it enacted Title VII (*id.* at 431). While the Court did not believe that Title VII was meant to "preclude[] the use of testing or measuring procedures" (*id.* at 436), it did believe that "Congress ha[d] forbidden * * * giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job per-

formance" (*ibid.*). Thus, in response to the exclusionary problems associated with the use of nondiscretionary selection devices, the *Griggs* Court held that a prima facie Title VII violation could be stated from evidence that "practices, procedures, or tests neutral on their face" (*id.* at 430) have statistically significant adverse effects (*id.* at 431-432, 436).

Where objective, facially neutral, selection devices have been in issue, the Court since *Griggs* has continued to approve the use of disparate impact doctrine. See, *e.g.*, *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975) (written tests); *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977) (height and weight requirements); *New York City Transit Authority* v. *Beazer*, 440 U.S. 568 (1979) (anti-narcotics rule); *Connecticut* v. *Teal*, 457 U.S. 440 (1982) (written examination). But where subjective selection devices have been in issue, and thus where the kind of exclusionary problems associated with nondiscretionary selection devices have not been present, the Court has declined to extend the disparate impact doctrine beyond the nondiscretionary selection devices and unique exclusionary problems that initially led to its adoption; instead, the Court has required Title VII plaintiffs to prove discriminatory motivation. See, *e.g.*, *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567 (1978) (subjective hiring practices); *Hazelwood School Dist.* v. *United States*, 433 U.S. 299 (1977) (same); *Teamsters* v. *United States*, 431 U.S. 324 (1977) (same); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973) (subjective refusal to rehire). Indeed, the Court has specifically indicated that disparate impact theory was inapplicable in two cases where plaintiffs challenged subjective decisionmaking processes.

First, in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. at 805-807, the Court contrasted a discretionary decision not to rehire an individual who had participated in unlawful conduct directed against an employer with the type of mechanical decisionmaking processes that were in issue in *Griggs*. The Court noted that *Griggs* (411 U.S. at 806 (citation omitted)):

> dealt with standardized testing devices which, however neutral on their face, operated to exclude many blacks who were capable of performing effectively in the desired positions. *Griggs* was rightly concerned that childhood deficiencies in * * * education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives. Respondent, however, appears in different clothing. * * * [His employer] does not seek his exclusion on the basis of a testing device which overstates what is necessary for competent performance, or through some sweeping disqualification * * *. [His employer] assertedly rejected [him] for unlawful conduct * * * and * * * this cannot be thought the kind of "artificial, arbitrary, and unnecessary barrier to employment" which the Court found to be the intention of Congress to remove.

Thus, the Court in *McDonnell Douglas* vacated the decision of the lower court, holding that it had erred in applying the *Griggs* requirement of "job-relatedness" to the reasons given to justify the subjective refusal-to-rehire (411 U.S. at 805-806).

Second, in *Furnco Construction Corp.* v. *Waters*, *supra*, the Court expressly refused to apply disparate impact analysis to an employer's practice of hiring only those persons whom his superintendent knew were experienced or had been recommended. 438 U.S. at 572, 575. In doing so, it contrasted the selection device in issue there with "employment tests * * * or particularized requirements such as * * * height and weight specifications," as were involved in *Griggs*, *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975), and *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977) (438 U.S. at 575 n.7).

The holdings in *Furnco* and *McDonnell Douglas* can be derived from the basic distinction between disparate impact and disparate treatment litigation. Accord, 3 A. Larson & L. Larson, *Employment Discrimination* § 76.34, at 15-87 (1986). Disparate impact litigation challenges

"facially neutral" selection procedures—*i.e.*, employment practices that are mechanical in nature and that limit, segregate, or classify independently of operator bias or influence. See *Teamsters* v. *United States*, 431 U.S. at 335-336 n.15. Disparate treatment litigation challenges "discretionary" selection devices—*i.e.*, the use or application of non-mechanical, operator-dependent procedures or criteria. See *McDonnell Douglas Corp.* v. *Green*, 411 U.S. at 802-806; *Teamsters* v. *United States*, 431 U.S. at 335-336 n.15. When an employer's decisionmaking process is in part discretionary or operator-dependent, "there is simply no 'neutral' factor involved. * * * [W]hat is going on is an ad hoc decision process in which a subjective judgment is being made about an individual" (3 A. Larson & L. Larson, *supra*, at 15-87 to 15-88). See also *id.* at 15-91 to 15-98; Note, *Evaluation of Subjective Selection Systems In Title VII Employment Discrimination Cases: A Misuse Of Disparate Impact Analysis*, 7 Cardozo L. Rev. 549, 580-582 (1986). Thus, such subjective decisionmaking processes have been assessed only for their operators' motivation—the sine qua non of a disparate treatment case.[12]

b. In channelling Title VII litigation in this fashion, the Court has been especially sensitive to the different defenses that are applicable in disparate treatment and disparate impact actions. See *USPS Bd. of Govs.* v. *Aikens*, 460 U.S. 711, n.1 (1983); *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 252 n.5 (1981); *McDonnell Douglas Corp.* v. Green, 411 U.S. at 802 n.14, 806 n.21; accord, *Connecticut* v. *Teal*, 457 U.S.

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[12] Where subjective decisionmaking processes are involved, the question of discrimination is subject to traditional methods of proof. By contrast, where objective decisionmaking processes are involved, the problem is that prior societal discrimination has been incorporated (for perhaps non-discriminatory reasons) into the decisionmaking process; proof of discrimination, if any, can only be accomplished by non-traditional means. Thus, the distinction between the legal theories applicable in challenges to objective and subjective decisionmaking processes also corresponds to the nature of proof that is readily available for use in such challenges.

at 456-464 (Powell, J., dissenting). In a disparate treatment case, after a plaintiff establishes a basis for inferring discriminatory intent (by use of the *McDonnell Douglas* factors or by other circumstantial or statistical evidence), the employer is required to articulate the reasons it had for the action it took and, in that way, is given the chance to refute the inference that an improper discriminatory motive was at work in its decision. See *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. at 252-259. By contrast, in a disparate impact case, after a plaintiff establishes that there is a statistically significant disparity in the treatment of majority and minority workers, the employer must show that the device under challenge has a demonstrable relationship to successful job performance. See *Albemarle Paper Co.* v. *Moody*, 422 U.S. at 425-426; *Washington* v. *Davis*, 426 U.S. 229, 246-252 (1976). Requiring employers to make this demonstration for subjective decisionmaking processes is impractical, however, and thus will undermine the myriad policies that Congress sought to accommodate when it enacted Title VII.

Establishing the necessary relation between the device under challenge and successful job performance is generally a complex, time-consuming, and expensive process. See generally Lerner, *Employment Discrimination: Adverse Impact, Validity and Equality*, 1979 Sup. Ct. Rev. 17; Gwartney, Asher, Haworth & Haworth, *Statistics, the Law, And Title VII: An Economist's View*, 54 Notre Dame Law., 633 (1979). It generally requires the development of detailed and rigorous empirical proof concerning the predictive value of a particular selection device, the qualifications that bear a "manifest relation" to the successful performance of the job in question, and the correlation between the two. See *Albemarle Paper Co.* v. *Moody*, 422 U.S. at 431-435; *Washington* v. *Davis*, 426 U.S. at 246-252. The industrial psychology profession has succeeded in validating or otherwise objectively substantiating a few objective selection devices. See, *e.g.*, *id.* at 248-252; *United States* v. *South Carolina*, 445

F. Supp. 1094 (D.S.C. 1977), aff'd without opinion *sub nom. National Educ. Ass'n* v. *South Carolina*, 434 U.S. 1026 (1978); *New York City Transit Authority* v. *Beazer*, 440 U.S. at 587 & n.31. But whatever the merits of requiring validation or other such rigorous proof for objective selection devices, subjective selection methods are not susceptible to such rigorous evaluative criteria and, practically speaking, may not be susceptible to validation or other such objective substantiation at all. See *McDonnell Douglas Corp.* v. *Green*, 411 U.S. at 802, 806 n.21; 3 A. Larson & L. Larson, *supra*, at 15-85 to 15-86; Maltz, *Title VII and Upper Level Employment—A Response to Professor Bartholet*, 77 Nw. U.L. Rev. 776, 787-788 (1983).

As a practical matter, therefore, allowing plaintiffs to challenge subjective decisionmaking processes on a disparate impact theory will force employers either to replace those selection practices with objective ones or to eliminate any statistical disparities by using quotas. See Gold, *"Griggs" Folly: An Essay on the Theory, Problems, and Origin of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform*, 7 Indus. Rel. L.J. 429, 459 (1985). But, as several members of this Court have warned, forcing employers to adopt objective selection practices or to adhere to racial quotas would be inconsistent with Title VII itself. See *Albemarle Paper Co.* v. *Moody*, 422 U.S. at 449 (Blackmun, J., concurring in the judgment); *Connecticut* v. *Teal*, 457 U.S. at 463-464 (Powell, J., dissenting); *Johnson* v. *Transportation Agency*, No. 85-1129 (Mar. 25, 1987), slip op. 19-21 (Scalia, J., dissenting).

To begin with, Title VII "was not intended to 'diminish traditional management prerogatives'" (*Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 259 (1981) (citation omitted)). To the contrary, Congress made clear that "'management prerogatives[ ] and union freedoms [should] be left undisturbed to the greatest extent possible.'" *Steelworkers* v. *Weber*, 443 U.S. 193, 206 (1979), quoting H.R. Rep. 914, 88th Cong.,

1st Sess. Pt. 2, at 29 (1963). See also *Firefighters* v. *Cleveland*, No. 84-1999 (July 2, 1986), slip op. 16-18; *Sheet Metal Workers* v. *EEOC*, No. 84-1656 (July 2, 1986) slip op. 27-39. The Court has accordingly said that the Congress enacting Title VII viewed courts and federal bureaucrats as incompetent to evaluate whether particular selection practices are necessary or preferable and left employers with substantial discretion to experiment and innovate in the choice and use of selection methods. See *Furnco Construction Corp.* v. *Waters*, 438 U.S. at 578; *Steelworkers* v. *Weber*, 443 U.S. at 205-208; *Hishon* v. *King & Spaulding*, 467 U.S. 69, 79 (1984) (Powell, J., concurring); *Connecticut* v. *Teal*, 457 U.S. at 463-464 (Powell, J., dissenting). Thus, even assuming that objective selection criteria exist or can reasonably be derived for particular job categories,[13] interpreting Title VII to require the replacement of discretionary selection devices with objective ones would undermine the congressional preference for experimentation and innovation in selection methods that this Court has recognized.[14]

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[13] For many employment decisions, of course, especially those involving professional or managerial positions, such objective selection criteria simply do not exist. There is, for example, no objective method for choosing law firm partners, for selecting professors for tenure, or for appointing business managers. See Maltz, *Title VII and Upper Level Employment—A Response To Professor Bartholet*, 77 Nw. U. L. Rev. at 787-788. And even where objective selection methods arguably might be available, many businesses are too small to afford them or to make appropriate use of them. See Lerner, *Employment Discrimination: Adverse Impact, Validity, and Equality*, 1979 Sup. Ct. Rev. 23.

[14] As one commentator has stated, requiring validation or a like-showing in cases involving subjective decisionmaking processes "would tend to have a chilling effect on all employers, big and small, discouraging badly needed experimentation and innovation in selection methods. * * * [S]uch a requirement would overstep the proper limits on government regulation in a free society, because it would impose a heavy legal burden on employers in the absence of any reason for believing that their procedures were harmful to the general public or unfair to any particular segment of it." Lerner, *Employment Discrimination: Adverse Impact, Validity, and Equality*, *supra*.

Likewise, Title VII cannot and should not be interpreted as requiring employers to institute preferential quotas to avoid Title VII liability. See *Steelworkers* v. *Weber*, 443 U.S. at 205-207; *Sheet Metal Workers* v. *EEOC*, No. 84-1656 (July 2, 1986), slip op. 27-39. While the Court has held that Title VII *permits* employers to engage in certain forms of voluntary affirmative action (see *Johnson* v. *Transportation Agency*, No. 85-1129 (Mar. 25, 1987); *Steelworkers* v. *Weber*, 443 U.S. 203), it has also recognized that Congress added Section 703(j) to Title VII [15] to assure congressional skeptics that the statute could not and would not be interpreted to "require employers or labor unions to use racial quotas or to grant preferential treatment to * * * avoid being charged with unlawful discrimination" (*Sheet Metal Workers* v. *EEOC*, slip op. 27). The congressional record is replete with comments "that employers would not be *required* to institute preferential quotas to avoid Title VII liability" (*Steelworkers* v. *Weber*, 443 U.S. at 207 n.7 (emphasis in original)). See *Sheet Metal Workers* v. *EEOC*, slip op. 27-39 (reviewing legislative history). But, since subjective decisionmaking processes cannot realistically be validated or otherwise shown to have a manifest necessity, applying disparate impact theory to them will "leave the employer with little choice * * * but to engage in a subjective quota system of employment," "far from the intent of Title VII" (*Albemarle Paper Co.* v. *Moody*, 422 U.S. at 449 (Blackmun, J., concurring in

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[15] Section 703(j) provides (42 U.S.C. 2000e-(2)(j)) that "[n]othing contained in this subchapter shall be interpreted to require any employer * * * to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer * * * in comparison with the total number or percentage of persons of such race, color, religion, sex or national origin in any community, State, section, or other area, or in the available work force in any community, State, section or other area."

the judgment). Accord, *Connecticut* v. *Teal*, 457 U.S. at 463-464 (Powell, J., dissenting); *Johnson* v. *Transportation Agency*, slip op. 19-21 (Scalia, J., dissenting).

This is not to suggest that anything in this Court's cases or the policies of Title VII would prohibit a Title VII plaintiff from using statistics to challenge the lawfulness of a subjective decisionmaking process. On the contrary, this Court has held that, in appropriate circumstances, a significant statistical disparity may fairly lead to an inference of intentional discrimination and thus constitute an important part of a prima facie case of disparate treatment. See *Hazelwood School Dist.* v. *United States*, 443 U.S. at 306-313; *Teamsters* v. *United States*, 431 U.S. at 335-336 n.15. In doing so, however, the Court has stressed (*id.* at 339-340 n.20 (emphasis added)) that:

> the statistical evidence [cannot be] offered or used to support an erroneous theory that Title VII requires an employer's work force to be racially balanced. *Statistics showing racial or ethnic imbalance are probative in a case such as this one [involving subjective hiring practices] only because such imbalance is often a telltale sign of purposeful discrimination;* absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired. *Evidence of longlasting and gross disparity between the composition of a work force and that of the general population thus may be significant even though § 703(j) makes clear that Title VII imposes no requirement that a work force mirror the general population.*

Implicit in this reasoning is the acknowledgment that Section 703(j) *does* bar imposition of liability in nonintent cases dealing with subjective practices merely because of a statistical imbalance. For, if a showing of statistical imbalance is sufficient to prove a violation where validation or other showing of manifest necessity

is not feasible, the very purpose of Section 703(j) would be defeated.

c. The Uniform Guidelines on Employee Selection Procedures (1978), 29 C.F.R. Pt. 1607, are, we believe, consistent with the conclusion advanced here. The Guidelines provide that the "use of any selection procedure which has an adverse impact on * * * employment * * * opportunities of members of any race, sex, or ethnic group will be considered to be discriminatory * * * *unless* the procedure has been validated * * * *or* the provisions of Section 6 [of the Guidelines] * * * are satisfied" (29 C.F.R. 1607.3A (emphasis added)). A "selection procedure" is defined to include "[a]ny measure, combination of measures, or procedure used as a basis for any employment decision[s] * * * includ[ing] the full range of assessment techniques from traditional paper and pencil tests * * * through informal or casual interviews and unscored application forms" (29 C.F.R. 1607.16Q). Section 6 of the Guidelines goes on to state, however, that "[t]here are circumstances in which a user *cannot or need not* utilize the validation techniques contemplated by these guidelines" (29 C.F.R. 1607.6B (emphasis added)), that such "circumstances" include the use of "informal or unscored selection procedure[s]" (29 C.F.R. 1607.6B(1)), and that, where such informal or unscored selection procedures are involved, the user need only "justify continued use of the procedure[s] in accord with Federal law" (*ibid.*).

While the Guidelines do not expressly so state (and admittedly point in different directions at once), we believe that, in situations involving subjective selection devices, an employer justifies "continued use of the procedure in accord with Federal law" by setting forth legitimate, nondiscriminatory reasons for maintaining the selection procedure and for applying it in particular cases, as is required in disparate treatment cases. See 43 Fed. Reg. 38290, 38291 & n.17 (1978); 44 Fed. Reg. 11996, 12001-12002 (1979); see generally *McDonnell Douglas Corp.* v. *Green*, 411 U.S. at 802. Otherwise, the Guidelines would leave the employer with no possible defense

to a showing that its subjective decisionmaking process has an adverse impact and, as Section 6 indicates, the Guidelines were not intended, and should not be interpreted, to place the employer in such a dilemma (which itself would be inconsistent with the policies underlying Title VII). See *Albemarle Paper Co.* v. *Moody*, 422 U.S. at 449 (Blackmun, J., concurring in the judgment); *Connecticut* v. *Teal*, 457 U.S. at 463-464 (Powell, J., dissenting).

3. In this case, of course, in addition to her disparate impact claim, petitioner raised a disparate treatment claim on which both the district court and the court of appeals found for respondent. The district court expressly found that respondent "met its burden of proof by presenting legitimate nondiscriminatory reasons for each employment decision" (Pet. App. 9c) and that there was "little or no evidence of discrimination" in respondent's promotion decisions (*id.* at 14c). The court below affirmed these findings, emphasizing that "[t]here is no indication in the record, nor is there any suggestion * * * by [petitioner] * * *, that the district court neglected to consider the statistical evidence presented by [petitioner] in terms of evaluating the credibility of [respondent's] proffered explanation for its promotion decisions" (*id.* at 9a n.13). In these circumstances, it makes no sense to allow petitioner to proceed against respondent on a disparate impact theory. She was refused "advancement * * * for [a] reason other than discrimination on account of * * * sex" and, accordingly, is not entitled to any relief under this statute (42 U.S.C. 2000e-5(g)).[16]

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[16] We note that, even assuming that she may proceed against respondent on a disparate impact theory, petitioner most probably could not make out a prima facie case of disparate impact in this case. Her sample size is so small that her statistics must be considered suspect on that basis alone. See *Teamsters* v. *United States*, 431 U.S. at 339-340 n.20; *Mayor of Philadelphia* v. *Educational Equality League*, 415 U.S. 605, 620-621 (1974). And the mere fact that there is an imbalance between percentages of blacks and whites in different levels of the workforce is not, without more, sufficient to state a prima facie case. See *Johnson* v. *Transportation Agency*, slip op. 13-15.

CONCLUSION

The petition for certiorari should be granted, limited to the first question presented.

Respectfully submitted.

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